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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933.

No. 166

FEDERAL COMPRESS AND WAREHOUSE COMPANY ET AL., APPELLANTS,

vs.

E. R. McLEAN, SHERIFF AND TAX COLLECTOR, APPELLEE.

REPLY BRIEF FOR APPELLANT.

Opposite counsel state (Brief, p. 3): "In the purchase of such cotton, there is from one to ten per cent of same that is not fit for interstate sale and shipment, which said cotton is sold locally." This has reference to the "overs" (Tr. 77), which are acquired "as an incident to the purchase and shipment of this cotton by buyer and sellers." Compare *Chassaniol* v. *Greenwood,* 148 So. (Miss., 1933) 783, wherein that here recited as an incident is made more explicit,

> "That a very small proportion of the cotton purchased by shippers (not exceeding 10 per cent), is bought when no contract for sale therefor exists; * * *. That the buyer cannot fill his orders without buying

> lots of cotton in their entirety because growers will sell no other way, and that, thereby, buyers accumulate small stocks of cotton, not exceeding 10 per cent of the amount they handle, being only a necessary incident to and concomitant of those purchases which are made for the purpose of filling specific contracts."

And, with deference, counsel is in error in stating that from one to ten per cent is not fit for interstate sale, for the agreed transcript shows that all except ten bales, which were shipped uncompressed, have moved in interstate commerce from appellant's plant (Tr. 80).

Compare dissenting opinion, Anderson, J., in the case, *supra*, where it is said:

> "In other words, under the facts in this case, the overage is as much a part of the interstate commerce as the 90 per cent. Appellants had the right, and did everything in their power, to carry on interstate commerce exclusively, but under the conditions existing they could not do so without carrying along this overage of 10 per cent. This being true, the state could not tax one without taxing the other. If the state could reach down into the stream of interstate commerce and dip out the domestic business for state regulation without hampering the free flow of the stream, its regulation would be valid. On the other hand, if the separation of the domestic business from the foreign would interfere with the free flow of the stream, the action of the state would be illegal."

With deference, full familiarity with the cotton business, as reflected by the agreed facts, is requisite to a thorough understanding of that here at issue, and therefore the decision by the local judges in *Matthews* v. *Rogers*, 284 U. S. 521, 76 L. Ed. 447, should be considered the controlling precedent as to factual background.

I.

Answering Opposite Counsel's Point I.

"THE IMPOSITION OF A STATE PRIVILEGE TAX UPON THE OPERATOR OF A COTTON WAREHOUSE AND COMPRESS, FOR THE PRIVILEGE OF STORING AND COMPRESSING COTTON CONCENTRATED AT CLEVELAND, MISSISSIPPI, DOES NOT VIOLATE PARAGRAPH 3 OF SECTION 8 OF ARTICLE 1 OF THE CONSTITUTION OF THE UNITED STATES, AS IMPOSING A STATE TAX UPON AN INSTRUMENTALITY ENGAGED IN INTERSTATE COMMERCE BECAUSE THE MOVEMENT OF COTTON CONCENTRATED AT CLEVELAND, MISSISSIPPI, IN INTERSTATE COMMERCE, DOES NOT BEGIN UNTIL THE STORAGE AND COMPRESS CHARGES ARE PAID, AND THE COTTON IS DELIVERED TO A CARRIER, FOR TRANSPORTATION, WITH A DESTINATION FIXED AT A POINT BEYOND THE BOUNDARIES OF THE STATE OF MISSISSIPPI" (Brief, p. 10).

Whereto we reply:

1. *Mississippi Supreme Court in Chassaniol* v. *Greenwood, supra, holds buying and selling of cotton shipped in on the railroad, predating compression, interstate commerce, as to movement from appellant's plant.*

Since the decision herein, Mississippi Supreme Court, *en banc*, decided *Chassaniol* v. *Greenwood*, the decision herein having been by Division A, not the entire court. The Chassaniol case had to do with the validity of a tax upon cotton buyers imposed by Greenwood, the cotton buyer doing those acts delineated herein, and thereunder it was held by the Mississippi Supreme Court, with deference, that all business save as to said "overs" and truck cotton was interstate commerce, but as to overs and truck cotton the State had power to tax as an intrastate transaction, and so did, the court being at pains to point out that over intrastate commerce the Legislature knew it possessed

power, and likewise knew that it might not tax interstate commerce, the court there saying:

> "The Legislature has facilities and opportunities for knowing business customs and conditions within the state. There is, in fact, much buying and selling of cotton in this state that is, in no sense, interstate commerce, and the Legislature knew this to be true. Cotton is a great commodity of this state and is bought and sold by people engaged in intrastate business to a considerable degree, at a considerable profit."

And further:

> "In the case before us, as to the 30% that is transported by trucks and wagons or other private conveyances and placed in storage in Greenwood, and not consigned to anyone outside the state, the property is not in interstate commerce. The owner might withdraw it, or sell it, whenever he pleases."

Compare opinion of Anderson, J., dissenting.

Therefore as to all of the cotton except the 30 per cent and "overs", we have thus a decision by Mississippi's Supreme Court, subsequent to this case, that those who bought and sold that cotton originating on the railroad were engaged in interstate commerce as to the very cotton that was compressed pursuant to such buying and selling, but nevertheless, only, at the instance of the carrier for space conservation, who paid therefor that allowed by the Interstate Commerce Commission under published tariffs. As this step preceded the compression at appellant's plant, we have the anomalous condition that as at an antecedent date in a through movement, the cotton is in interstate commerce as to 70 per cent of it. Then under our opinion, it ceases to be in interstate commerce and becomes intrastate commerce, and thereafter again becomes interstate commerce when actually loaded on the cars, in pursuance

of its previous venture in interstate commerce when bought and sold; as to that cotton coming in by rail, appellant is the sole depot of the railroad company.

2. *Appellant an Instrumentality of the Railroad Company for Interstate Cotton Shipment.*

The contract between the parties provides:

> "That by reason of the nature of cotton and the commercial practices and customs under which it is handled, and by reason of the conditions of buying, selling, storing and transporting it, and by reason of and for the general convenience of all concerned, * * *
>
> "The intent and purpose of this agreement, * * * is to confirm the Compress Company as the Limited Agent of the railroad company for the purposes of receiving cotton from the railroad company, delivering cotton to the railroad company, loading and unloading cotton from and into the cars of said railroad company * * * and as principal to furnish the premises for the use of the railroad company as a cotton depot under and subject to all of the terms and conditions of this agreement and the lawfully published tariffs and regulations of the railroad company * * *."

Thereunder, on behalf of the railroad company, the appellant will "promptly receive and receipt for, unload from cars, shelter when practicable, compress and load into cars, in order of receipt, or as may be otherwise directed by the railroad company, the following cotton:

(*a*) Cotton delivered by its owner to compress company for shipment;

(*b*) Cotton consigned to compress points on straight bill of lading;

(*c*) Cotton destined to compress points, consigned to "order", or in any other manner;

(*d*) Cotton covered by through bills of lading delivered by the railroad company to the compress company for compression;

and thereunder the compress company was to "promptly load cotton when directed by the railroad company, properly marked and compressed to comply with all applicable tariff and or maritime regulations, into cars in quantities (whenever practicable) of not less than 75 bales in a 36 foot car 8½ feet high, other cars proportionately," and (Tr. 90)

> "To compress all cotton to a density of at least 22½ pounds per cubic foot and to place on each bale intended for export not less than eight bands and * * * the density of compression and the banding on shipments moving through ports will conform to the maritime regulations of the port through which the cotton moves * * *";

and, further;

> "The railroad company agrees to pay and the compress company to accept, in full payment, in so far as the railroad company is concerned, for all services hereunder, the compression allowance authorized in the railroad company's current tariffs on cotton, compressed by the compress company for the railroad company's account and moves from the compress over the rails of the railroad company" (Tr. 91).

Quoad cotton, therefore, the plant of appellant was the railroad company's depot for receipt and shipment, and its service to the carrier was paid for by the carrier for space conservation of the carrier's equipment, and the holding of the Mississippi court, with deference, that that done at the plant after the sale, which was interstate commerce, was intrastate commerce, is inconsistent and not in any wise conclusive.

3. Congressional Occupation of Its Power Over Interstate Commerce Changed the So-called "Common-law rule."

The cases relied upon by appellee may possibly express "the common law" as to when commerce becomes interstate, but under the Constitution, when acts are preliminary and convenient for interstate commerce, the Congress may thereunto pass statutes which thereby convert these incidents into interstate commerce. Wherein consider:

(*a*) The United States Warehouse Act. *Jones* v. *Hiawatha Gin & Milling Co.*, 17 Fed. (2) 193, Chapter 10, U. S. C. A., Vol. 7, Title Warehouses, Chapter 313, 39 Stat. at Large.

(*b*) Interstate Commerce Act, Section (1), U. S. C. A., page 11, declaring that commerce embraces "all services in connection with the receipt, delivery, elevation, and transfer in transit * * *. storage and handling of property transported," and thereunto we have the congressional declaration making that hereunder done interstate commerce, whereunto the Interstate Commerce Commission has fixed the price on carrier's privilege of compression east of the river at 15 cents, and is now investigating the whole rate structure as to compression west of the river, in the Southwestern Rate Investigation, having thereover assumed full jurisdiction pursuant to the Interstate Commerce Act.

4. The Stream Theory.

That which appellee does is to isolate the function performed by appellant and look at it, not coordinated with that which precedes, that which follows, that of which it is a part. Given the stream theory announced first authoritatively in *Swift & Co.* v. *United States*, 196 U. S. 395, 49

L. Ed. 518, as fitting "the commerce clause to the real and practical essence of modern business growth," counsel wrongfully deals with the compression as intrastate commerce, and breaks the continuity; does not see the forest for the trees, when Congress has, pursuant thereto, enacted the Warehouse Act and applied the Interstate Commerce Act.

Compare *Minnesota* v. *Blasius,* Adv. Sheets, November 7, 1933, where the Chief Justice said:

> "Applying the cardinal principle that interstate commerce as contemplated by the Constitution 'is not a technical legal conception,' this Court said, in *Swift & Company* v. *United States,* 196 U. S. 375, 398, 399: 'When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce.' "

Therein, likewise, was approved *Stafford* v. *Wallace,* 258 U. S. 495.

As said in the *Blasius case, supra:*

> "But, by reason of a break in the transit, the property may come to rest within a State and become subject to the power of the State to impose a nondiscriminatory property tax. Such an exertion of State power belongs to that class of cases in which, by virtue of the nature and importance of local concerns, the State may act until Congress, if it has paramount authority over the subject, substitutes its own regulation (Note No. 4). The 'crucial question', in determining whether the State's taxing power may thus be exerted, is that of 'continuity of transit.' *Carson Petroleum Co.* v. *Vial,* 279 U. S. 95, 101."

It being there further declared:

> "The question is always one of substance, and in each case it is necessary to consider the particular occasion or purpose of the interruption during which the tax is sought to be levied. *Champlain Company* v. *Brattleboro, supra,* p. 377; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commisssion,* 219 U. S. 498; *Texas & N. O. R. R. Co.* v. *Sabine Tram Co.,* 227 U. S. 111; *Carson Petroleum Co.* v. *Vial, supra.* The mere power of the owner to divert the shipment already started does not take it out of interstate commerce if it appear 'that the journey has already begun in good faith and temporary interruption of the passage is reasonable and in furtherance of the intended transportation.' *Hughes Bros. Co.* v. *Minnesota,* 272 U. S. 469, 476.
>
> "Where property has come to rest within a State, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the State, or for shipment elsewhere, as his interest dictates, it is deemed to be a part of the general mass of property within the State and is thus subject to its taxing power."

5. *Judge Anderson's Dissent in the Chassaniol Case.*

There he said, with deference, correctly:

> "Before getting down to the exact question involved it would be very well to have in mind the surrounding principles as declared by the Supreme Court of the United States—the sidelights. A product may be a part of interstate commerce before it begins its actual physical journey therein. Where goods are purchased in one state for transportation to another, the purchase is interstate commerce quite as much as the transportation. *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 42 S. Ct. 106, 66 L. Ed. 239. The buying and selling of goods for shipment beyond state lines is interstate commerce, notwithstanding that af-

ter the purchase some of the goods may be sold in local markets. *Lemke* v. *Farmers' Grain Co.*, 258 U. S. 50, 42 S. Ct. 244, 66 L. Ed. 458. The carrying of goods from one state to another, as the result of orders previously received from the originating state, is interstate commerce, and is not subject to license fees imposed by the state into which they are shipped. *Wagner* v. *Covington*, 251 U. S. 95, 40 S. Ct. 93, 64 L. Ed. 157. The buying of grain in one state for shipment to markets in another state, if followed by such shipment, is interstate commerce. *Shafer* v. *Farmers' Grain Co.*, 268 U. S. 189, 45 S. Ct. 481, 69 L. Ed. 909. The negotiation for the sale of goods which are in another state for the purpose of introducing them into the state in which the negotiation is made is interstate commerce. *Crenshaw* v. *Ark.*, 227 U. S. 389, 33 S. Ct. 294, 57 L. Ed. 565; *Weeks* v. *U. S.*, 245 U. S. 618, 38 S. Ct. 219, 62 L. Ed. 513. The sale and delivery of coal f. o. b. cars at the mine for transportation to purchasers in other states is interstate commerce. *Pa. R. Co.* v. *Sonman Shaft Coal Co.*, 242 U. S. 120, 37 Sup. Ct. 46, 61 L. Ed. 188. The right to solicit or take orders for interstate commerce business is a part of interstate commerce, and not subject to state regulation. *Vance* v. *W. A. Vandercook Co.*, 170 U. S. 438, 18 S. Ct. 674, 42 L. Ed. 1100. Where a commodity is a part of an actual constant and flowing stream out of a state from which the owner may draw part of it for use in the state before reaching the state border, a tax on the flow is a burden on interstate commerce which the state cannot impose. Such a flow in interstate commerce is a reasonable class of business. *Stafford* v. *Wallace*, 258 U. S. 495, 42 S. Ct. 397, 66 L. Ed. 735, 23 A. L. R. 229. A tax on flowing commerce does not become valid and constitutional because it applies to domestic commerce as well. *Crew-Levick Co.* v. *Pa.*, 245 U. S. 292, 38 S. Ct. 126, 62 L. Ed. 295. A person cannot be required to pay a state line tax for the mere privilege of carrying on interstate or foreign commerce. *City of Sault Ste. Marie* v. *International Transit Co.*, 234 U. S. 333, 34

S. Ct. 826, 58 L. Ed. 1337, 52 L. R. A. (N. S.) 574; *Crutcher* v. *Ky.*, 141 U. S. 47, 11 S. Ct. 851, 35 L. Ed. 649."

6. *Cotton Buyer's Connection with the Cotton Makes it a Part of Interstate Commerce Before Compression.*

The agreed facts show that the usual custom is that cotton buyers take from persons outside of the State an absolute contract to deliver to them certain cottons, and having so done they then go upon the market to fulfill, by purchase, that which they have sold short. Thereby that thus purchased becomes interstate commerce. *Sonneborn Bros.* v. *Keeling*, 262 U. S. 515, 67 L. Ed. 1100:

> "Many of the sales by the appellants were made by them before the oil to fulfill the sales were sent to Texas. * * * They were, in fact, contracts for the sale and delivery of oil across state lines. The soliciting of orders for such sales is equally exempt. Such transactions are interstate commerce in its essence and any state tax upon it is a regulation of it and void," citing cases.

Compression postdated this act, and postdating, it was had to make the cotton movement possible.

7. *Acts Preliminary and Convenient for, but not Absolutely Essential, to Interstate Commerce, Make This Movement Interstate.*

The Supreme Court of Mississippi held "the assembling of cotton in warehouse and its compression are acts preliminary, convenient for, but not absolutely essential to its transportation to other states or countries."

Thereasto, the decision of this Court is final and, with deference, the declaration that these are not absolutely essential for interstate commerce is true in the qualified sense that railroad transportation is not essential, but that the

movement therein may be made by ox-wagons, for under the agreed facts, the movement of three cars of uncompressed cotton in the place of one car of compressed cotton is such an economic loss as to make, from the viewpoint of commerce, the movement "absolutely essential." In short, convenience is a relative term, and so being, there must be available for interstate transportation those conveniences which render possible the movement at the minimum cost unobstructed by State authority. Compare *Southern Pacific Co.* v. *Calexico*, 288 Fed. 642; *Rodgers* v. *Matthews*, *supra*.

8. *Certain Cases Differentiated.*

The factual background in *Coe* v. *Errol*, 116 U. S. 517, 29 L. Ed. 715; *Diamond Match Co.* v. *Ontonagon*, 188 U. S. 81, 47 L. Ed. 394; *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459, 63 L. Ed. 1084; *Crescent Oil Co.* v. *State of Miss.*, 257 U. S. 129, 66 L. Ed. 166, is radically different.

Counsel's citation of *Carson Petroleum Co.* v. *Vial*, 279 U. S. 94, 75 L. Ed. 626, with deference, is inappropriate, as its doctrines support that herein contended for. Confessedly as to 75 per cent of the cotton movement by rail, the journey was begun and was continued as from the initial point and the carrier paid for the compression to conserve its space. Suppose the State of Mississippi had prohibited absolutely cotton compression. Thereby it would have prevented commerce in cotton as now existing, the Court saying in *Southern Pacific Co.* v. *Calexico*, 288 Fed. 642:

> "To hold that it could not be compressed before shipment would be to hold in effect that it could not be shipped at all."

9. *General Oil Co.* v. *Crane*, 209 *U. S.* 212, 52 *L. Ed.* 754.

Chief Justice Taft adverted to this case in *Carson Petroleum Co.* v. *Vial*, 279 U. S. 105, remarking the Court was

divided and "there was very vigorous dissent. The case has caused discussion, and it must be admitted that it is a close one and might easily have been decided the other way. The result was probably affected by the impression created by the original situation and the same artificial rearrangement of tanks in a large entrepot for redistribution of oil to avoid previous taxation," and therein was remarked:

> "There has been a liberal construction of what is continuity of the journey in the cases where the Court finds from the circumstances that export trade has been actually intended and carried through, especially *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 478, 55 L. Ed. 310; *Texas & New Orleans Railroad Co.* v. *Sabine Tram Co.*, 227 U. S. 111, 57 L. Ed. 442."

And as declared in the Vial case, approved in the Blasius case:

> "The determining circumstance is that the shipment of the lumber to Sabine was but a step in its transportation to its real and ultimate destination in foreign countries. In other words, the essential character of the commerce, not its mere accidents, should determine. It was to supply the demand of foreign countries that the lumber was purchased, manufactured and shipped, and to give it various character by the steps in its transportation would be extremely artificial."

10. *Cases Further Distinguished.*

None of the cases relied upon by appellee contain the principle that the conditioning at the plant was essential and prerequisite to the continuance of that particular type of commerce under its original characteristics. Here cotton must be exported, more than 50 per cent thereof usually going abroad, and the placing of eight bands thereon is

requisite for conformity to marine requirements, and if the State could tax the preparation of the cotton for entering into export trade to such an extent as to prevent it from so doing, then thereby the authority thereover would be divided and not single as is under the decisions of this Court absolutely requisite.

The factual background in *Merchants Exchange* v. *Missouri*, 248 U. S. 365, 63 L. Ed. 300, is radically different from that here. Here the distinction as to *Hope Natural Gas Co.* v. *Hall*, 274 U. S. 284; *Oliver Iron Mining Co.* v. *Lord*, 262 U. S. 172, 67 L. Ed. 929; *Philadelphia, etc., Co.* v. *Commonwealth*, 82 U. S. 164; *Heisler* v. *Colliery Co.*, 260 U. S. 245, 67 L. Ed. 237; *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 163, 76 L. Ed. 1038, is that in each of them there was a separable element normally existent subordinate to State power and the exercise of that taxed was not a condition to the commercial consumption of the business sought to be taxed.

The other cases cited and relied upon by appellee, with deference, are not controlling.

As remarked by opposite counsel, under his contention, "The compressing of the cotton is the final step in preparing the bales of cotton to become a commodity of interstate commerce," but such preparation is made at the instance of the carrier for the benefit of the carrier under a rate fixed by the Interstate Commerce Commission for a service rendered at a property licensed by the United States Government under the National Warehouse Act, and which unless performed as performed, would, under the Mississippi decision, render the commerce inconvenient, to say the least of it, commercially impossible.

Counsel's conclusion is made plain at page 40, when he says:

> "Cotton does not require storage in a warehouse or compression by a compress of the character here in-

volved, as a necessary prerequisite to becoming an article of interstate or foreign commerce,"

but there is no showing that there is any other available instrumentality whereby it may so become at the present time, and here, compression must be had for carrier space conservation, and to deny the carrier the right thus to transport would be to require the movement of three cars of uncompressed cotton instead of one car of compressed cotton. The character of the commodity being so light in weight as to thus require compression before commercial transportation is reasonably practicable. Before compression (out of the record), cotton was transported in open cars piled high and subject to fire and other hazards. Now its transportation is in closed cars, free from the weather, wherefor density is a prime requisite.

As to counsel's point II, with deference, we reiterate the decisions and the reasons embodied in our brief without further thereto replying.

Respectfully,

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